85-941

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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LILLIAN JONES and JOSEPH JONES, INDIVIDUALLY AND AS CO-ADMINISTRATORS FOR THE ESTATE OF JOSEPH CLARK, DECEASED,

Petitioners,

vs.

JAMES L. WELLS, SHERIFF; MARION COUNTY SHERIFF'S DEPARTMENT; MARION COUNTY SHERIFF'S MERIT BOARD; BOARD OF COMMISSIONERS OF MARION COUNTY; WILLIAM HUDNUT, CHIEF ADMINISTRATOR OFFICER OF MARION COUNTY,

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

==========

LILLIAN JONES AND
JOSEPH JONES
3133 N. PENNSYLVANIA ST.
INDIANAPOLIS, IN 46205
(317) 926-0753
PRO SE

QUESTION PRESENTED

In an accidental police shooting case brought under 42 U.S.C. Section 1983 and charging that the shooting was the result of the municipal defendants permitting their officers without training to withdraw lethal firearms at will, should a directed verdict entered in favor of those municipal defendants be affirmed on appeal solely because of a jury verdict in favor of the defendant police officer.

PARTIES INVOLVED

The parties are as listed in the caption.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.....	i
PARTIES INVOLVED.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED.....	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	4
STATEMENT OF THE CASE.....	5
JURISDICTION OF LOWER FEDERAL COURTS.....	8
REASONS THE WRIT SHOULD ISSUE.....	9
CONCLUSION.....	16
APPENDIX A (ORDER OF THE COURT OF APPEALS OF SEPTEMBER 4, 1985).....	1a
APPENDIX B (JUDGMENT OF THE COURT OF APPEALS OF SEPTEMBER 4, 1985).....	27a
APPENDIX C (FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES).....	30a

TABLE OF CONTENTS (CONTINUED)

APPENDIX D (FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES)..... 32a

APPENDIX E (42 U.S.C. SECTION 1983)..... 34a

TABLE OF AUTHORITIES

PAGE

CASES

Heller v. Bushey, 759 F.2d 1371 (9th Cir.1985)..... 14

Monell v. Department of Social Services, 436 U.S. 658 (1978)..... 6

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Fifth Amendment..... 4

U. S. Constitution, Fourteenth Amendment..... 4

STATUTES

28 U.S.C. Section 1254(1)..... 3

28 U.S.C. Section 1291..... 8

28 U.S.C. Section 1331..... 8

28 U.S.C. Section 1343..... 8

42 U.S.C. Section 1983..... i
4
6

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==========

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

==========

The Petitioners, Lillian Jones and Joseph Jones, respectfully pray that a

writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 4, 1985.

OPINIONS BELOW

Attached are the Judgment and Order of the United States Court of Appeals for the Seventh Circuit.

GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

This case was tried to a jury beginning on October 13, 1983. At the close of the plaintiffs' case on October 17, 1983, the trial court entered directed verdicts for all defendants except the shooting officer (Ernest Riggs). (Tr. 465-66) On October 19, 1983, the jury returned a verdict in favor of Riggs.

The United States Court of Appeals for the Seventh Circuit affirmed on September 4, 1985, with one Judge dissenting. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners believe that this case involves the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

Petitioners, individually and as co-administrators of the Estate of Joseph Clark, Deceased, sought relief at trial against Marion County (Indiana) Deputy Sheriff Ernest C. Riggs and various municipal defendants, namely Sheriff James L. Wells, the Marion County Sheriff's Department, the Marion County Sheriff's Merit Board, the Board of Commissioners of Marion County, and William Hudnut, Chief Administrator Officer of Marion County for the October 7, 1979 accidental shooting death of petitioners' son Joseph Clark by Deputy Riggs during a misdemeanor arrest. The issues involved in the present Petition concern the trial court's directed verdict on Count II of the complaint as contained in the pre-trial order, namely

a count under 42 U.S.C. Section 1983 against the municipal defendants for the inadequate training and policy toward officers in withdrawing their firearms. At issue was the policy permitting officers to withdraw their firearms at any time and giving no training to those officers on when to withdraw or not withdraw the weapons. The trial court found that there was no connection sufficient under Monell v. Department of Social Services, 436 U.S. 658 (1978) to permit liability under 42 U.S.C. Section 1983 against the municipal defendants. The United States Court of Appeals for the Seventh Circuit affirmed the directed verdicts against the municipal defendants without reviewing the correctness of this opinion by the trial court. The Court of Appeals instead stated that given its

"conclusion that the jury properly found that Riggs did not violate Clark's constitutional rights, it follows that the County defendants could not have done so vicariously."

JURISDICTION OF LOWER FEDERAL COURTS

The jurisdiction of the trial court was based upon 28 U.S.C. Section 1331 and 28 U.S.C. Section 1343. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. Section 1291.

REASONS THE WRIT SHOULD ISSUE

The decision of the Court of Appeals in affirming without review the directed verdicts for the municipal defendants is in conflict with the decisions of other federal courts of appeals and is a serious departure from the accepted and usual course of judicial proceeding.

There is no question but that the United States Court of Appeals for the Seventh Circuit did not decide the correctness of the directed verdicts in favor of the municipal defendants. In avoiding the resolution of that matter, the Court of Appeals failed to treat the principal claim of error before it. It did not treat the essentially uncontradicted evidence that Deputy Sheriff Ernest Riggs was, in withdrawing his loaded firearm, acting pursuant to

the policies and customs of the municipal defendants. The evidence was uncontradicted that Riggs had received no training regarding when to draw a service revolver. (Tr. 174-76, 182-86, 196) The municipal defendants had no policy on when to withdraw a weapon from the holster. (Tr. 191, 192) Accordingly, defendant Riggs was acting pursuant to and in conformity with the policies and training of the municipal defendants when on the night in question he withdrew his firearm and pushed it against the back of Joseph Clark during an attempted misdemeanor arrest, all resulting in Mr. Clark's death upon accidental discharge. (Tr. 260) The Court of Appeals accordingly did not deal with the substantial evidence produced by plaintiffs that the policies and training

in question were entirely inadequate and led to the unintended death of Joseph Clark. (Tr. 375-77, 382-84)

The Court of Appeals instead avoided all of these issues by finding that the jury must have found no constitutional violation whatever in order to have accorded Deputy Riggs a verdict, thus that it was unnecessary to address the possible errors in the directed verdicts for the municipal defendants.

To understand the incorrectness of the reasoning of the Court of Appeals, it is only necessary to consider the district judge's instructions to the jury on plaintiffs' burden of proof.

> In order to prove his claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence in the case, the following facts,
>
> First: That Deputy Sheriff Riggs knowingly or wantonly caused the

death of Joseph Clark;

Second: That Deputy Sheriff Riggs then and there acted under color of law of the State of Indiana or regulation issued by the Sheriff of Marion County, Indiana.

Third: That Deputy Sheriff Riggs' acts and conduct deprived Joseph Clark of his federal constitutional right not to be denied or deprived of his liberty or life without due process of law; and

Fourth: That Deputy Sheriff Riggs' acts and conduct were the proximate cause of injury and death of Joseph Clark.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

(Tr. 727-28)

It is self-evident that the question of whether "Deputy Sheriff Riggs knowingly or wantonly" acted is entirely

separate from whether the municipal defendants acted knowingly, wantonly, negligently, or with any other requisite mental state. Indeed, it is the very inadequacy of the policies and training afforded Deputy Riggs that would persuade the jury that Riggs did not knowingly or wantonly cause the death of Joseph Clark.

The unfairness and the departure from the accepted and usual course of judicial proceedings attendant to the district court's ruling is underscored by the closing argument of defense counsel in which he quite effectively argued that "Deputy Riggs' actions were right in accord with Sheriff Wells' own policy." (Defense closing, Tr. p. 9)

Further, the decision of the Court of Appeals is at odds with the more informed decisions of other courts in

such cases as Heller v. Bushey, 759 F.2d 1371 (9th Cir.1985).*

There would have been nothing inconsistent had all of plaintiffs' claims gone to the jury about a jury verdict in favor of Deputy Riggs but against all of the municipal defendants whose policies he was innocently carrying out.

One final point should be noted. The conclusion of the Court of Appeals

---

*Although Heller v. Bushey, supra, was concerned primarily with the possibility that the good faith immunity defense might have produced different jury views of the evidence on the claims against the officer and his policy-making superiors, the same reasoning is applicable to the case at bar. Certainly, the allegedly constitutionally offensive acts charged against the municipal defendants were different than the simple act of an accidental discharge of a weapon charged against Deputy Riggs. Furthermore, there indisputably is a difference between the mental elements applicable to Deputy Riggs as opposed to the mental elements applicable to the municipal defendants.

that the jury obviously found that there had been no constitutional deprivation in the case is the least likely explanation of the jury's deliberations. There is no dispute but that Joseph Clark suffered a constitutional deprivation; he lost his life without due process of law. That was not the battle ground of the dispute. The issue was whether it occurred as a result of Deputy Riggs' requisite mental state and whether it occurred as the result of any action, custom, or policy of the municipal defendants.

Accordingly, the principal portion of plaintiffs' suit was never resolved by the jury.

CONCLUSION

A writ of certiorari should issue to the United States Court of Appeals for the Seventh Circuit to review this matter and to ensure plaintiffs' right to trial by jury on their substantial claims against the municipal defendants responsible for the policies that they claim took their son's life. The Seventh Circuit should be directed to treat on the merits the issue of the appropriateness of directed verdicts in favor of the municipal defendants.

Lillian Jones

LILLIAN JONES

Joseph Jones

JOSEPH JONES

APPENDIX A

ORDER OF THE COURT OF APPEALS

OF SEPTEMBER 4, 1985

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued February 28, 1985

September 4, 1985

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

LILLIAN JONES & JOSEPH JONES, Individually and as Co-Administrators of the Estate of Joseph Clark, Deceased,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Plaintiffs-Appellants,	)	No. 80 C 915
No. 83-3075 vs.	)	
ERNEST C. RIGGS,	)	JAMES E. NOLAND, Judge.
Defendant-Appellee.	)	

O R D E R

Plaintiffs Lillian Jones and Joseph Jones, acting individually and as co-administrators for the estate of Joseph

Clark, brought this suit against Deputy Sheriff Ernest Riggs and various officials associated with the Marion County, Indiana, Sheriff's Department (the "County defendants"). Plaintiffs seek money damages for the death of Clark, who died when Deputy Sheriff Riggs unintentionally shot him in the course of a misdemeanor arrest. The case proceeded to trial in three counts, the first of which alleged that Riggs violated Clark's constitutional rights. 42 U.S.C. Section 1983. The second count raised a similar claim against the County defendants, alleging that their inadequate training of police officers and lack of policy governing the withdrawal of weapons contributed to Clark's death. The final count consisted of a pendent Indiana state wrongful death action. At the

close of plaintiffs' case, the trial court directed a verdict in favor of the County defendants. A jury later returned a general verdict in favor of Riggs on the first and third counts. On appeal plaintiffs argue that the trial court erred in various evidentiary rulings and in directing verdicts in favor of the County defendants. We affirm.

I. Counts I and II: The Federal Constitutional Claims

In reviewing plaintiffs' evidentiary claims, "we bear in mind that decisions regarding the admission and exclusion of evidence are peculiarly within the competence of the district court and will not be reversed on appeal unless they constitute a clear abuse of discretion." Ellis v. City of Chicago, 667 F.2d 606, 611 (7th Cir. 1981). See also Gorby v. Schneider Tank Lines, Inc., 741 F.2d

1015, 1018 (7th Cir. 1984); United States v. Cannon, 715 F.2d 1228, 1232 (7th Cir. 1983); United States v. Brown, 688 F.2d 1112, 1115 (7th Cir. 1982). Plaintiffs argue that the court erred in granting defendants' motion in limine to prevent, among other things, any discussion of a decision by the Sheriff's Merit Board (the "Board") to suspend Riggs for six weeks without pay for violating its Rule 367(E)1/ governing use of deadly force2/. They further claim that even if the court correctly granted the protective order in the first instance, the evidence should have been admitted when defendants later "opened the door" by eliciting testimony from the County Sheriff about his restrictive interpretation of that Rule.

The trial court justified its decision to exclude introduction of the

Board decision by noting that "it's based on a different--their decision is made and their hearing was held in regard to a different basis than what is before the court in this legal action . . . ." (Tr. 244). In other words, the court either concluded that the evidence had no relevance to the issue of whether Riggs or the County defendants violated Clark's constitutional rights, Fed. R. Evid. 401, or that the danger of unfair prejudice or confusion by a jury, unfamiliar with the Board's process, focus of inquiry, or standard of proof, outweighed any probative value, Fed. R. Evid. 403.

We begin our evaluation of plaintiffs' first evidentiary claim by reviewing the allegations in their complaint and the court's instructions to the jury. Plaintiffs alleged that Riggs

"intentionally, recklessly, or negligently" deprived Clark and plaintiffs of various rights, privileges and immunities, including, but not limited to,

> the right to life, liberty and property, the right to have children and a family, the right to the expectation and support from one's children, the right to be secure in one's person and effects, the right to be free from cruel and unusual punishment, the right to the equal protection of the laws, the right to be free from the unreasonable exercise of the police power in the search and seizure of one's person, house, papers, and effects, and the right to due process of law.

The trial court in its instructions characterized the complaint as alleging "that Joseph Clark was deprived of his life and liberty under color of state law or regulation in that Deputy Sheriff Riggs either intentionally, recklessly or negligently used unlawful force in his arrest." (Tr. 720). (Emphasis added). It later instructed the jury that "[i]n

order to prove [their] claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence . . . [t]hat Deputy Sheriff Riggs knowingly or wantonly caused the death of Joseph Clark. . . ." (Tr. 727). A "knowing" act was defined as an act "done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." A "wanton" act was defined as an act "done in reckless disregard or indifference to, the rights of one or more persons, including the injured person." (Tr. 728). Thus, despite plaintiffs' acknowledged allegation of negligent deprivation of constitutional rights, the court instructed the jury to find for plaintiffs only if Riggs' conduct was intentional or reckless. Constitutional rights can be impaired

through the negligent acts of others, see Parratt v. Taylor, 451 U.S. 527, 547 548 (1981) (Powell, J., concurring); Crawford v. Edmonson, No. 84-2371, slip op. at 12-14 (7th Cir. June 3, 1985). Plaintiffs, however, never specified the constitutional provisions violated by Riggs through mere negligence. In any event, plaintiffs failed to complain about the instruction, and have waived any challenge to its contents or omissions. Even if the Board's finding that Riggs used deadly force in violation of Rule 367 indicates a breach of duty relevant to an inquiry into negligence, it does not go to the question of intent or recklessness focused on by the court. We find no abuse of discretion in the court's initial decision to prevent introduction of the Board's finding, which was

irrelevant to the circumscribed issues before the jury. Moreover, the trial court reasonably could have concluded that introduction of the finding may have misled or prejudiced the jury by tempting it to equate the Board's finding of a Rule violation with Riggs' violation of Clark's constitutional rights.

Plaintiffs' second contention is more troublesome. Defendants, on cross-examination, asked the County Sheriff whether Rule 367 governing use of deadly force "goes to when you may actually intentionally pull the trigger of your gun . . ." and not to when an officer merely can remove a gun from his or her holster (Tr. 267). The sheriff answered affirmatively. Since plaintiffs conceded that Riggs did not intentionally fire at Clark, a logical inference to be drawn

from this statement (or rather misstatement) of law was that Riggs did not violate the Rule. Defendants knew at the time that the Board had found that Riggs did violate the Rule even though he did not intend to pull the trigger and shoot Clark. Plaintiffs argue that defendants "opened the door" to introduction of the Board's finding by calling into issue the legal reach of Rule 367.

Plaintiffs, however, waived any right to challenge the previous decision of the court to grant defendant's motion in limine. The sheriff's damaging testimony did not come as a surprise to plaintiffs. Defendants solicited a yes or no answer to a carefully crafted and detailed question. Plaintiffs had an opportunity to object and prevent the information from reaching the jury, yet

chose to remain silent. Only after defendants completely finished cross-examining the witness did plaintiffs approach the bench. And even then they did not object to the admission of the sheriff's statement. Instead, they argued that the statement "opened the door" to their admission into evidence of the Board's finding. Plaintiffs later failed to seek a curative jury instruction on either the weight to attach to the sheriff's statement or the appropriate inferences to be drawn from it.

Plaintiffs showed no concern for the prejudicial impact of the statement, and viewed it only as an opportunity to introduce the Board's finding in rebuttal. To the extent plaintiffs were concerned about the sheriff's misstatement of the scienter required to make out

a violation of the Rule, they should have called the error to the attention of the court and jury, and presented a correct statement of the law. While introduction of the Board finding was one way to set the record straight, it was not the exclusive method. In any event, introduction of an irrelevant misstatement of law does not open the floodgates for admission of any and all rebuttal evidence, irrespective of that evidence's relevance to the issues to be decided. The unfortunate answer given by the sheriff did not make the Board's finding any more relevant to the question of whether Riggs intentionally or recklessly violated the constitutional rights of Clark. The trial court initially refused to introduce the Board's finding because (1) it lacked relevance or (2) its

potential for unfair prejudice or confusion outweighed any probative value. The sheriff's misstatement of law could not--and did not--render the Board finding any more relevant to the issue of violations of Clark's constitutional rights. The federal Constitution, and not Rule 367, defines the scope of liability under section 1983. Neither did the statement shift the balance between probative value and unfair prejudice. If none of the factors relevant to the court's initial decision to exclude the finding changed as a result of the sheriff's statement, there was no reason to alter that decision.3/

Plaintiffs next argue that the court violated Fed. R. Evid. 404 when it admitted evidence concerning Riggs' character. Plaintiffs earlier had

introduced expert evidence concerning the skills Riggs should have possessed when he attempted to arrest Clark. In particular, an expert stated that Riggs should have possessed

> interactive skills, how to talk to the drunk and how to deal with the drunk, and everything again is designed to protect life . . . so the skills are verbal, and when those fail, the skills become the use of force that is less than deadly, the use of those kind of pain compliance holds we talked about, the use of the baton. Tr. 387-389.

In response, Riggs' supervisors testified that he was well-mannered and low key, given to "going the extra step to communicate to avoid a problem" (Tr. 492), "very good with the public" (Tr. 539), and able to "handle anything" (Tr. 540). While "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving

that he acted in conformity therewith on a particular occasion . . ." Fed. R. Evid. 404(a), the complained-of evidence was not admitted to show that Riggs was well-mannered on the night of the tragic shooting, that he bent over backwards to communicate with Clark, or that he "handled" the situation well. Rather, the testimony rebutted the insinuation of plaintiffs' expert that Riggs lacked necessary police skills.4/ Such a use is proper. Cf. Kerr v. First Commodity Corp. of Boston, 735 F.2d 281 (8th Cir. 1984); United States v. Vitale, 728 F.2d 1090 [(]8th Cir. 1984).

Plaintiffs also argue that the court erred in admitting evidence about the dangerous character of the apartments where the shooting occurred. While we question the probative value of this

evidence to a determination of whether Riggs intentionally or recklessly violated Clark's civil rights, the information was not stressed and played little of a role, if any, in resolution of the dispute. Any error in its introduction was harmless.

Last, given our conclusion that the jury properly found that Riggs did not violate Clark's constitutional rights,5/ it follows that the County defendants could not have done so vicariously. See Richardson v. City of Indianapolis, 658 F.2d 494, 500 (7th Cir. 1981). Accordingly, we affirm the jury verdict and the directed verdict with respect to plaintiffs' civil rights action under 42 U.S.C. Section 1983.

II. Count III: The Pendent Indiana State Wrongful Death Action

Plaintiffs allege that Riggs

violated both a statute6/ and a departmental regulation (Rule 367) governing the use of deadly force, that such violations in and of themselves demonstrate negligence, and that this negligence entitles recovery of damages for the wrongful death of Clark. Indiana's wrongful death statute permits recoveries based on negligent conduct that leads to death. IND. CODE Section 34-1-1-2. Violations of safety statutes or regulations create a rebuttable presumption of negligence on the part of the violator. Bohrkaste v. City of Terre Haute, 470 N.E.2d 738, 744-745 (Ind. App. 1984). Plaintiffs argue that the trial court erred by failing to admit the Board's report as proof of negligence.

The Indiana Court of Appeals considered this precise issue in Warren v.

City of Indianapolis, 375 N.E.2d 1163 (Ind. App. 1978). The administrator of the estate of a man who died from an overdose of barbituates brought a wrongful death action against the city of Indianapolis and a police officer who left the dying man in a grassy field to "sleep it off," mistakenly believing the man merely to be drunk. The trial court granted defendants' motion in limine to exclude any reference to the results of an internal police disciplinary proceeding brought against the officer for violation of departmental regulations. Plaintiffs appealed from an adverse judgment, arguing, inter alia, that the results of the proceeding were erroneously excluded. Drawing an analyogy [sic] from the rule prohibiting introduction into evidence of a prior criminal

conviction (following trial) in a civil suit arising out of the same incident, the appellate court held that "admission of this evidence was irrelevant and properly refused." Id., 375 N.E.2d at 1165.

The jury, and the jury alone, has responsibility to decide whether Riggs breached a duty of care owed to Clark. The Board's opinion about the existence of a breach has no bearing on the jury's resolution of this ultimate issue--it does not make it more or less likely that Riggs violated the Rule. The record does not reveal the procedures followed by the Board, the issues it considered, the object of its inquiry, or its standard of proof. At the very least, the trial court could conclude that the evidence's potential for prejudice outweighed any

probative value. Fed. R. Evid. 403.7/

Finding no abuse of discretion, the judgment of the district court is

AFFIRMED.

CUDAHY, Circuit Judge, dissenting:

I respectfully dissent with respect to the admission of character evidence concerning Deputy Sheriff Riggs. Ostensibly, this evidence was admitted in rebuttal to testimony by plaintiffs' expert that Riggs lacked the necessary training and police skills. But that testimony was relevant only to the claim against Marion County, and the rebuttal testimony was admitted after a verdict had been directed in favor of the County. Hence, it appears that the evidence could only have been introduced to show that Riggs acted in conformity with his character on the night in question. This

would perhaps not be a serious enough problem to merit reversal were it not for the exclusion of the disciplinary report which concluded that the officer had acted unreasonably. Certainly the trial judge has substantial discretion with respect to the admission of evidence but here the cumulative effect of these evidentiary rulings unfairly handicapped the plaintiffs.

FOOTNOTES

1/ That rule provides:

> The use of deadly force against persons by deputy sheriffs and/or county policemen shall be restricted to the following:
>
> 1. In defense of himself or others, when assaulted and in reasonable danger of serious bodily harm, and when there is no apparent means of subduing the person committing the assault.
>
> 2. As a last resort when effecting an arrest of a fleeing felon when the felony is of the type which

normally causes or threatens death or serious bodily harm or which involves the breaking and entering of a dwelling place or other place where human beings live or are employed and when arresting officer reasonably believes that the arrest cannot be otherwise effected.

3. An officer lawfully arresting a misdemeanant may use all the force that is reasonably necessary to accomplish the arrest short of deadly force as qualified by paragraph one (1) above.

4. Any police employee who officially discharges a firearm, excluding qualification, matches, or individual practice, must submit a written report to the Sheriff explaining such incident.

2/ The Board found as follows:

In reviewing the evidence given in connection with the shooting of Joseph Clark on the evening of October 6, 1979, the Marion Co. Sheriff's Merit Board finds that there was force in violation of Rule 367. However, we believe that the use of this force was unintentional, based on circumstances surrounding the incident, and that the firing of the weapon, resulting in death, was unintentional.

Because of the judgment used in not employing other means in subduing

> the prisoner, it is our unanimous finding that Deputy Riggs be suspended for a period of six weeks without pay.

R. 21, Exhibit E.

3/ Defendants argue that the Board's report is inadmissible not only because it is irrelevant, but also because it is excludable as a remedial measure taken subsequent to allegedly negligent conduct. Fed. R. Evid. 407. Plaintiffs reply that an exception applies. Rule 407 promotes "a social policy of encouraging, or at least not discouraging [people] from taking steps in furtherance of added safety." Advisory Committee's Note. This basis for exclusion does not apply when the party taking remedial measures suffers no prejudice through introduction of the evidence as an admission of fault. Although the Board originally was a party defendant, it was dismissed out on a directed verdict. Regardless of whether the Board's report is properly characterized as a "remedial measure," Rule 407 cannot be invoked to prevent the report's intriduction [sic] into evidence against Riggs because the Board suffers no prejudice. See, e.g., Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974); Grenada Steel Industries v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir. 1983). See also 10 Moore's Federal Practice Section 407.05 (1985).

Evidence of subsequent repairs "may be admitted for any purpose that does not

require an inference to the negligence or culpable conduct of the repairer . . . ." Wright and Graham, Federal Practice and Procedure, Evidence Section 5290 and n.2 (1980). Since plaintiffs do not seek to introduce the report as evidence of the Board's negligence, Rule 407 would not require exclusion of the evidence if otherwise admissible. Of course, being irrelevant, the report is not otherwise admissible.

4/ Although the dissent is correct in noting that the testimony regarding Riggs' lack of training and police skills was relevant to the claim against Marion County, the evidence was also probative of Riggs' own intentional, reckless or negligent conduct (see Tr. 397), thus permitting introduction of character evidence in rebuttal.

5/ A plaintiff must show both state action and impairment of a constitutionally protected right to recover damages under section 1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). Noting that Riggs' theory of the case never involved an immunity defense, and that the jury received no instructions on the subject, the general verdict in favor of Riggs, a state actor, must imply that the jury found no constitutional violation.

6/ That statute provides, in relevant part:

> A law enforcement officer is justified in using reasonable force if he

> reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only if he reasonably believes that that force is necessary:
>
> (1) To prevent serious bodily injury to himself or a third person or the commission of a forcible felony; or
>
> (2) To effect an arrest of a person who has committed or attempted to commit a felony.

IND. CODE Section 35-41-3-3.

7/ Neither will we upset the court's directed verdict in favor of County defendants on the wrongful death claim. The jury found for Riggs, concluding either (1) that he was not negligent, or (2) that Clark was contributorily negligent. Either conclusion would foreclose liability against County defendants as well.

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS

OF SEPTEMBER 4, 1985

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 4, 1985

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

LILLIAN JONES & JOSEPH JONES, Individually and as Co-Administrators of the Estate of Joseph Clark, Deceased,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Plaintiffs-Appellants,	)	No. 80-C-915
No. 83-3075 vs.	)	
ERNEST C. RIGGS,	)	James E. Noland, Judge.
Defendant-Appellee.	)	

JUDGMENT

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by

counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX C

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

APPENDIX D

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.